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# In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law

## I INTRODUCTION

C.M.K. was born in the People's Republic of China in 1978. After witnessing the savage beating of his father by the village leader and fearing similar treatment for himself, C.M.K. left his village in 1994 at the age of 16. Desperate to seek a better life, he met with smugglers who arranged for his transport to the United States. Eventually, C.M.K. arrived at a home outside of New York where he was held captive and repeatedly beaten for being unable to pay an additional \$25,000. After the smugglers moved the juveniles to a cramped apartment in New York City, the Immigration and Naturalization Service (INS) raided the domicile and arrested all inhabitants. Because C.M.K. was a juvenile and had no parent or relative in the United States, the INS detained him in custody, intending to send him back to China. Alone and without adult assistance or support, C.M.K. faced deportation.

This scenario describes the real-life plight of a child illegally present in the United States without proper family care.<sup>1</sup> Thousands of other children are similarly situated, and they represent one of the most vulnerable groups in American society. Not only must these individuals deal with the usual difficulties of being undocumented immigrants such as linguistic and cultural barriers and the inability to work legally, but they are also *children*—both legally and practically too young to meet successfully the demands of life alone.

Recognizing the hardships of children illegally present in the United States without appropriate family care, Congress enacted a statute to allow these juveniles to adjust to lawful permanent resident status.<sup>2</sup> Referred to as Special Immigrant Juveniles, these children were granted lawful permanent residence status by the INS after presenting evidence that they were dependent on a juvenile court. To find a child dependent, the juvenile court needed to determine that the child was eligible for long-term foster care and that it was not in the child's best interest to return to his country of nationality.<sup>3</sup> In 1997, as a result of litigation challenging juvenile court jurisdiction over children in

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1. This fact pattern is drawn from the case of *In re Welfare of C.M.K.*, 552 N.W.2d 768 (Minn. Ct. App. 1996). Eventually, C.M.K. was released into the care of Lutheran Immigration and Refugee Social Services which placed him with a foster family. On behalf of C.M.K., his foster family brought a dependency proceeding in the county district court that was denied because the judge believed the federal deportation proceedings eliminated the juvenile court's jurisdiction. The Minnesota Court of Appeals affirmed the lack of jurisdiction and the denial of a finding that C.M.K. was eligible for long-term foster care. *Id.* at 771.

2. Immigration and Nationality Act § 101(a)(27)(J) (codified as amended at 8 U.S.C. § 1101(a)(27)(J) (1994 & Supp. 1999).

3. 8 U.S.C. § 1101(a)(27)(J) (1994).

deportation proceedings, Congress amended the Special Immigrant Juvenile (SIJ) provision.<sup>4</sup> The amendments made clear that the need for long-term foster care must be due to “abuse, neglect, or abandonment” and added the requirement that juveniles in the actual or constructive custody of the INS obtain the Attorney General’s consent in order to give the juvenile court jurisdiction over dependency proceedings.<sup>5</sup>

The 1997 amendment has created new problems, resulting from both the legal interpretation the INS has given the statute and from policy problems in administering the changes. The revised SIJ law gives additional power and discretion to INS officials, arguably allowing them to usurp authority better placed with the juvenile courts. Many children who previously were clearly eligible for SIJ status now face difficult the INS bureaucracy, interminable delays, and a tangled web of laws. While the INS claims that the amended law guarantees that only children who legitimately fit under Congress’s original purpose for the provision may now obtain SIJ status, advocates believe that many children genuinely in need of juvenile court supervision and the benefits of lawful permanent resident status are now being denied assistance.

This note argues that children illegally in the United States without proper family care should not be subject to the INS’s determination of whether they should be dependent on a juvenile court because the INS has no experience in determining the best interests of children and because federal authority in family matters is quite limited. A child’s eligibility for SIJ status should turn on the juvenile’s need for proper care and for the benefits of lawful permanent residence, not on whether the undocumented child happens to have avoided the INS’s attention and custody. When government creates and applies laws to aid children illegally in the United States without proper care, the focus should be on the best interests of the child. An analysis of the 1997 amendments from this perspective strongly suggests that the changed law fails to aid children and that legislative or administrative solutions should to be developed to guarantee children adequate protection and benefits.

Part II of this note describes the nature and purpose of the SIJ law and explores the legal challenges that erupted over the INS’s interpretation of the pre-amendment SIJ statute. Part III considers Congress’s response to this controversy, the 1997 amendment, focusing on the consent requirement for children construed to be in INS custody. Part IV analyzes the impact of this amendment and details the problems that have arisen to date. Part V explores potential legal challenges to the amendment, including the issues of federal-state law interaction and the appropriate definition of constructive custody in this context. Part VI evaluates the policy concerns raised by the application of the amended law. In particular, this note examines the importance of the best interests of the child standard and how the 1997 amendment works at cross-purposes to the goal of the original SIJ law—to protect and aid children in need. In conclusion, the note suggests

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4. Immigration and Nationality Act, Pub. L. 105-119, § 113, 111 Stat. 2440, 2460-61 (1997) (codified as amended at 8 U.S.C. § 1101(a)(27)(J) (Supp. V 1999).

5. *Id.*

possible ways to more effectively implement the SIJ law.

## II. PRE-AMENDMENT SPECIAL IMMIGRANT JUVENILE LAW

The Special Immigrant Juvenile provision of the Immigration and Nationality Act of 1990<sup>6</sup> (INA) was passed in response to growing complaints that no method existed to help court-dependent juvenile aliens regularize their immigration status. Such frustrations stemmed partially from the effective expiration of a legalization provision in the Immigration Reform and Control Act of 1986<sup>7</sup> that had allowed many dependent alien juveniles to gain lawful permanent resident status.<sup>8</sup> However, these benefits were severely restricted to only a limited number of aliens who had been in the United States before 1982.

Seeking to offer humane relief to newly arrived undocumented children in court-dependent situations, Congress added the special immigrant juvenile provision, §101(a)(27)(J), to the INA.<sup>9</sup> The purpose of the law as understood by the INS is given in the Summary to the Federal Register report on the Code of Federal Regulations. "This rule alleviates hardships experienced by some dependents of the United States juvenile courts by providing qualified aliens with the opportunity to apply for special immigrant classification and lawful permanent resident status, with the possibility of becoming citizens of the United States."<sup>10</sup>

The SIJ provision was amended almost immediately after passage to eliminate or reduce many of the standard grounds for inadmissibility and deportation. Most significantly, SIJ applicants are exempted from the public charge requirement and may not be removed because of entry without proper documents.<sup>11</sup> Additionally, SIJs can apply for discretionary waivers of most of the other exclusion provisions including those relating to HIV positive status, persons who committed fraud to enter the United States, and mental or physical disorders that poses a risk of harm to self, others or property.<sup>12</sup>

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6. 8 U.S.C. § 1101(a)(27)(J).

7. Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

8. This provision is referred to in the Supplementary Information to the Code of Federal Regulations for 8 U.S.C. § 1101(a)(27)(J). See 58 Fed. Reg. 42844 (1993).

9. See 8 U.S.C. § 1101(a)(27)(J). The statute reads in relevant part:

(J) an immigrant

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care, and

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.

10. 58 Fed. Reg. 42844 (1993).

11. INA § 237(c), 8 U.S.C. § 1227(c) (Supp. 1998); INA § 245(h)(2)(A) (Supp. 1998), 8 U.S.C. § 1255(h)(2)(A) (1994).

12. The general grounds for inadmissibility appear in INA § 212(a). The list of waivable inadmissibility grounds for SIJ may be found in INA § 245(h)(2)(B), 8 U.S.C. § 1255(h)(2)(B) (1994).

The procedure under the 1990 SIJ law was relatively simple. The undocumented alien child had to obtain three things from a state court with competent jurisdiction: a dependency order, a finding that the applicant is deemed eligible for long-term foster care, and a ruling that it is not in the child's best interest to be returned to the home country. The SIJ applicant then submitted these juvenile court documents to the local INS District Office, along with Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and an I-485 application for the adjustment of status. The INS office then conducted short interviews to review the documents. Although the INS did occasionally deny SIJ status to children who presented the appropriate documentation, there was no statutory basis for these denials. Congress set no numerical limits for the number of SIJ petitions that may be granted, and there appeared to be no discretion written into the original SIJ statute.<sup>13</sup>

The SIJ provision was enacted in response to the growing problem of alien children who were identified as abandoned or neglected. The Supreme Court has acknowledged the tremendous number of unaccompanied children arriving in the U.S. and estimated that the INS arrested 5950 unaccompanied alien juveniles in 1990 alone.<sup>14</sup> While no exact statistics are available as to the number of youth who took advantage of the SIJ provision after 1990, the best estimates of immigration attorneys suggest that at least several hundred children each year were helped.<sup>15</sup> While this number is small relative to the overall number of immigrants admitted to the United States each year, it nevertheless represents a substantial number of children whose lives were improved by the SIJ law.

In the case described in the opening paragraph of this note, an unaccompanied and undocumented Chinese youth alien was detained by the INS and then released into the care of Lutheran Immigration Social Services, who located a foster family in Minneapolis for C.M.K. When the foster family petitioned the District Court of Hennepin County for a dependency order and the other necessary findings prerequisite for a SIJ application, the juvenile court judge denied the petition in October 1995. He reasoned that the federal immigration proceedings preempted state court proceedings and, therefore, the state court was without jurisdiction to find C.M.K. dependent.<sup>16</sup>

In *In re C.M.K. (C.M.K.)*, the Minnesota Court of Appeals affirmed the decision citing the Supreme Court's holding that "[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, and obligations

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13. E-mail from Kathy Brady, Immigrant Legal Resource Ctr., to Katherine Porter, student, Harvard Law School (Nov. 22, 1999) (on file with author). As Brady noted, "The INS couldn't routinely deny SIJs to children within their custody, because before 1997 if the court made the proper findings the INS had no basis to deny (they did, all the time, but there was no statutory legal basis)." *Id.*

14. See *Reno v. Flores*, 507 U.S. 292 (1993).

15. Telephone Interview with Maureen O'Sullivan, Attorney with Kaplan, O'Sullivan and Friedman, Boston, Mass., (Dec. 8, 1999).

16. *In re Welfare of C.M.K.*, 552 N.W.2d 768 (Minn. Ct. App. 1996).

or burdens of aliens as such, the treaty or statute is the supreme law of the land.”<sup>17</sup> The opposition to the juvenile court jurisdiction came not only from the INS, but also from Hennepin County Social Services who ostensibly was trying to limit the number of court-dependent children.

After *C.M.K.*, the local INS District Office appears to have adopted as its standard position that any juvenile court petition by a child in deportation proceedings should be opposed on the grounds of lack of juvenile court jurisdiction. In a 1996 case arising a year after *C.M.K.*, the juvenile court judge agreed with the petitioner family and the child, Y.W., and issued the prerequisite orders for SIJ status. However, on appeal by the INS and the local county Community Services, the Minnesota Court of Appeals reversed the juvenile judge’s determinations. Citing *C.M.K.*, the court in *In re Welfare of Y.W.* (Y.W.) noted that preemption occurs when “Congress implies an intent to occupy the regulated field.”<sup>18</sup> Noting its belief that Congress had granted the Attorney General exclusive custody over illegal immigrants, the court found that outside judicial involvement in deportation proceedings should be limited to habeas actions brought because the “Attorney General is not proceeding with reasonable dispatch.”<sup>19</sup>

The Y.W. court also reasoned that even presuming juvenile court jurisdiction was proper, granting a dependency order to Y.W. would be inappropriate. In reaching this conclusion, the court determined that since Y.W. had been in the care of the foster family, the child was neither “without necessary food, clothing, shelter, education or other required care,” nor “without the special care made necessary by a physical, mental or emotional condition,” nor “the victim of physical or sexual abuse.”<sup>20</sup> Noting the excellent care provided to Y.W. by his foster family and the fact that the INS would deport Y.W. back to China rather than return him to the care of the smugglers who had starved and abused him, the court reasoned that there was no present basis for a juvenile court order since the child was not in harm’s way.<sup>21</sup> Although it acknowledged that Y.W.’s life might be threatened if returned to China, the Minnesota Court of Appeals felt that this determination lay squarely within the province of the immigration judge presiding over the federal deportation proceeding. Therefore, the child Y.W. was denied the benefit of SIJ status because he was in deportation proceedings at the time he sought relief under the SIJ provision.

In *Gao v. Jennifer*, the INS and the petitioner family again battled over the proper

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17. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 62, 63 (1941)).

18. *In re Welfare of Y.W.*, a/k/a J.W., 1996 WL 665937, at \*2 (Minn. Ct. App. Nov. 19, 1996).

19. *Id.*

20. MINN. STAT. § 260.015(2)(a)(3), (2)(a)(9) (1998) (repealed and recodified as MINN. STAT. §§ 260B.007, 260C.007 (1999)).

21. A member of the three-judge panel wrote a concurrence expressing serious reservations about the policy implications of this interpretation of the law. *Y.W.*, 1996 WL 665937, at \*4 (Randall, J., concurring). Essentially, the judge noted the irony of finding the INS an adequate guardian for a child’s best interest while simultaneously recognizing their vigorous efforts to deport him from the United States. His comments are discussed further in Part V of this note. *Id.*

interpretation of the SIJ provision for children in deportation proceedings.<sup>22</sup> Reaching federal district court, the case presented the issue of whether the INS could deny SIJ status to a child who had obtained the proper juvenile court findings. The INS contended that the plaintiff child was “not eligible for special immigrant juvenile status as a matter of law, because the declaration of dependency from the Michigan Probate Court that Plaintiff relies on to establish his eligibility was preempted by federal law and without legal effect.”<sup>23</sup> The foster family argued on behalf of the child that the INS had no statutory basis for denying SIJ status to a child who presented the proper juvenile court findings and met the other criteria in INA § 101(a)(27)(J) for SIJ status.

Advancing the arguments made in *C.M.K.* and *Y.W.*, the *Gao* court cited the Supremacy Clause of the Constitution as authority for its determination that the juvenile court orders were invalid.<sup>24</sup> The court reasoned: “[f]ederal authority over immigration matters is very broad . . . [o]ver no conceivable subject is the legislative power of Congress more complete.”<sup>25</sup> Noting that the child was in the physical custody of Lutheran Immigration and Refugee Services, the court nonetheless ruled that an unaccompanied child in deportation proceedings remained in the legal custody of the INS, regardless of his or her physical whereabouts and who exercised control over the child’s well-being.<sup>26</sup>

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22. *Gao v. Jennifer*, 991 F. Supp. 887 (W.D. Mich. 1997), *rev'd.*, 185 F.3d 548 (6th Cir. 1999).<sup>22</sup> Although *Gao* was decided December 22, 1997, after the passage of the November 26, 1997 amendment became law, the *Gao* court failed to consider the amended language. Although the INS interpreted the amendment to apply to all SIJ proceedings, regardless of stage of progress, on appeal, the Sixth Circuit determined that the retroactive application of the amendment was inappropriate. *See Gao*, 185 F.3d 548. Therefore, the court evaluated *Gao*’s claim to SIJ according to the pre-amendment law in effect at the time *Gao* sought SIJ status. The court reversed the district court and held that absent an explicit directive from Congress, the fact that an immigrant is in INS “legal custody” does not deprive state courts of jurisdiction they would otherwise have. Judge Boggs noted that he believes the 1997 amendment provides exactly that congressional command for all future SIJ cases. *Id.* *See also* *Yu v. Brown*, 92 F. Supp. 1236 (D.N.M. 2000) (holding that the amendment to the SIJ statute did not apply retroactively so that juvenile aliens with applications pending in November 1997 at the time of the amendment are not subject to the additional requirements of the amended SIJ provision).

23. *Gao*, 991 F. Supp. at 889.

24. Note VI, Clause 2 of the Constitution provides that the laws of the United States “shall be the supreme Law of the Land.” U. S. CONST., art. VI, cl. 2. On this basis, the Supreme Court has ruled that state law that conflicts with federal law is “without effect.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

25. *Gao*, 991 F. Supp. at 889 (citing *Reno v. Flores*, 507 U.S. 292 (1993)). The mention of the legislative power of Congress suggests an interesting conundrum. Since Congress passed the SIJ provision to benefit unaccompanied children and provided no explicit basis for denying SIJ status to children in deportation hearings, arguably federal law does not conflict with state law. In short, the SIJ provision reflects Congress’s intent that unaccompanied children, even those in deportation proceedings, benefit from the law. After all, it was the federal SIJ statute that petitioner was seeking to utilize in *Gao*. This is essentially the reasoning adopted in the appeal of *Gao*.

26. *Id.* The court specifically referred to the written agreement between the INS and Lutheran Social Services, which specified that “these minors, although released to the physical custody of the CRS recipient, shall remain in the legal custody of the INS.” Cooperative Agreement between the Government of the United States of America and Lutheran Immigration and Refugee Services, Note I, § 1.1b. However, not every release agreement appears to contain this wording. In one instance, the agreement between the INS and child’s caretaker stated “INS may terminate the custody arrangements and *assume legal custody* of the juvenile if [she] fails to comply with the foregoing.” *See* Respondent’s Brief in *In re Guang Li*. Further, this retention of cus-

The court acknowledged:

If Plaintiffs had not previously been arrested and taken into custody of the INS, it appears that he would meet the special immigrant juvenile provisions. However, because Plaintiff was arrested, detained, and in the legal custody of the INS at the time of the probate court proceedings, the state probate court had no jurisdiction over him.<sup>27</sup>

Under this interpretation, it appeared that no unaccompanied and undocumented child in deportation proceedings could utilize the SIJ provision.

However, an INS memorandum on the subject of special immigrant juveniles in deportation proceedings issued May 30, 1997 interpreted the law more liberally. The Office of the General Counsel concluded that while “*detained* juvenile aliens in INS custody are not eligible for long-term foster care” and therefore SIJ status, juveniles who are paroled by the Attorney General into the custody of a social services agency can petition the juvenile court to issue a dependency order.<sup>28</sup> This memo noted that the “juveniles whom Congress primarily intended to benefit from section 101(a)(27)(J) were deportable aliens” and therefore reasoned that juvenile courts should be able to issue the necessary findings for SIJ petitions to child aliens in deportation proceedings.<sup>29</sup> This INS memo seems to contradict the position taken by the local INS offices in the cases of *C.M.K., Y.W.*, and *Gao*.<sup>30</sup>

As demonstrated by the varying results and legal interpretations of the SIJ provision during the period 1995-1997, whether a child in deportation proceedings could take advantage of the SIJ law depended entirely on whether or not he had been arrested by INS and on how aggressively the local INS office interpreted the SIJ law. The differing interpretations of the SIJ provision for children in deportation proceedings led to the INS's request for clarification from Congress.

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tody explicitly stands in contradiction to the legal definition of custody of a minor child as adopted by many states. See e.g., MASS.GEN. LAWS ch. 8, § 31 (Law Co-op. 1994) (noting that legal custody is the power to make decisions relating to the “child’s welfare including matters of education, medical care, emotional, moral and religious development.”).

27. *Gao*, 991 F. Supp. at 890.

28. Memorandum from Office of the General Counsel to Jack Penca, EROCOU (December 21, 1995), 74 INTERPRETER RELEASES 978 (emphasis added).

29. *Id.*

30. Although the INS in its memo seems to be describing the exact situation in the trio of above-discussed cases, there is also a strict legal definition of parole, which may not have been met by the release agreements in these cases. INA § 212(d)(5) allows the Attorney General discretion to “parole” an alien into the United States temporarily at his/her discretion. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 121 (1997). One expert has noted that the provision is often used to “allow applicants for admission to avoid detention pending determinations of admissibility.” *Id.*

### III. PASSAGE AND INTERPRETATION OF 1997 AMENDMENT

As part of an appropriations bill for the Departments of Commerce, Justice, and State, Congress acted to amend § 101(a)(27)(J) of the INA.<sup>31</sup> Senator Domenici of New Mexico, who believed he had identified a few cases of abuse of the SIJ statute in his state, spearheaded the changes.<sup>32</sup> Specifically, Congress was concerned about children becoming juvenile court dependents just so they could obtain SIJ status and a green card, rather than because they truly needed the protection of the juvenile court due to abuse, neglect or abandonment. Although under the laws of every state, juvenile court orders are only available to youth who need court protection, even some immigration advocates concede that occasional instances of abuse of the SIJ provision occurred.<sup>33</sup> These situations often took the form of a family setting up what appeared to be abusive or neglectful situations for the purpose of enabling their child to obtain SIJ status and a green card. Although under both the original and amended statute, parents of SIJ were not allowed to benefit from their child's SIJ status, for some families the opportunity for their child to become a U.S. citizen was perceived as important enough to justify abuse of the SIJ provision. Given the universal agreement that the original statute's purpose was to protect children in need, advocates generally did not object to the new requirement that the finding for foster-care eligibility stem from abuse, neglect, or abandonment.

The other significant change made by the 1997 amendment was the requirement that the Attorney General consent to SIJ proceedings. Congress added a third criteria to the definition of SIJ, mandating that any such child be one "in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status." Although this provision has received differing interpretations, the latest INS Memorandum seems to provide definitive guidance:

Juvenile courts do not need the Attorney General's consent to take jurisdiction to issue dependency orders for these juveniles [not in INS custody] . . . INS officials should not become involved in juvenile court proceedings in order to consent to dependency orders. Rather, the Attorney General's consent to the dependency order should be reflected in a grant or denial of the petition for SIJ status.<sup>34</sup>

This reading effectively reverts to the pre-amendment situation, where if the other elements of the SIJ statute are met, the INS must give its consent and then must grant the

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31. See Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997) (codified as amended at 8 U.S.C. § 1101 (a)(27)(J) (Supp. V 1999)).

32. See Memorandum from Kathy Brady, Immigrant Legal Resource Center, to people working with Special Immigrant Juvenile Status Application (Dec. 9, 1997) (on file with author).

33. Interview with Eleanor Newhoff, Immigration Attorney, Greater Boston Legal Service, in Boston, Mass. (Nov. 30, 1999).

34. Memorandum from Thomas E. Cook, Acting Assistant Commissioner, INS to Regional Directors (July 9, 1999) (on file with author).

petition for SIJ status unless there is an ineligibility factor. Consent in this context, therefore, is only a requirement to make sure that the other two provisions of the statute are met, i.e., that the orders of the juvenile court satisfy the statutory language. Because this reading of the amendment appears to return the law to the pre-amendment status quo, this change is not considered further.

The most controversial change made by Congress, and the provision considered in depth in this note, is that children in the actual or constructive custody of the INS must obtain the consent of the Attorney General *prior* to the juvenile court's adjudication of the dependency order and findings. For juveniles in INS custody, the statute dictated an exception:

- (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction, . . . .<sup>35</sup>

This change resulted from the INS's request that Congress explicitly adopt its position in the custodial SIJ cases described *supra* in Part II.

While the strong language in this provision probably was intended as definitive guidance, both the INS and advocates have struggled to interpret this provision of the amendment and apply it in varying custodial situations. Unfortunately, the INS failed to promulgate any final regulations giving guidance, but instead merely issued two field memoranda.

The first field memorandum, released in October, 1998, seemed to grant the INS extraordinary power to consent or deny consent to all SIJ applications, including those petitions brought by children not in any type of INS custody. Field Memorandum #1 required the submission to the INS of "documentation which establishes abuse, neglect or abandonment as the underlying cause for the court's dependency order."<sup>36</sup> This seemed to authorize the INS to essentially re-adjudicate the juvenile court order, and to require a SIJ applicant to release sensitive information to the INS. Advocates responded with concerns about the confidentiality of dependency proceedings, a requirement imposed by state juvenile court procedures. Kathy Brady, of the Immigrant Legal Resource Center, warned of "INS lack of expertise to evaluate dependency proceedings or interview traumatized children about abuse, and possible INS abusive behavior and misuse of confidential information."<sup>37</sup> Attempting to prevent the INS from conducting extensive re-examinations of the evidence of abuse, neglect, or abandonment, child advocates generally requested that juvenile court judges specify in their orders that the eligibility for long-term foster care specifically resulted from abuse, neglect, or abandonment.

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35. 8 U.S.C. § 1101(a)(27)(J)(I) (1994 & Supp. 1999).

36. Memorandum from Thomas Cook, concerning "Field Guidance on Special Immigrant Juveniles", HQ/70/6.IP (Aug. 7, 1998).

37. Memorandum from Kathy Brady, Immigrant Legal Resource Center, (December 9, 1997) (on file with author).

With respect to the consent requirement for children in custody, the INS adopted the position that all juveniles delegated to the foster care of a social service agency are still in INS custody. However, the field memo failed to establish a formal mechanism for obtaining consent or any guidelines for INS officers to use in determining whether to grant consent. Since children in INS custody are normally in deportation proceedings, the INS clearly is charged with the duty to prosecute the deportation. How, when, and if, the INS should subjugate this duty to give consent to juvenile court jurisdiction and SIJ status was left unspecified and within the INS's discretion.

The second field memorandum, issued July 9, 1999, clarified and "supercede[d] the previous guidance on this subject."<sup>38</sup> The main point of the Field Memorandum #2 was to inform district offices that for juveniles not in custody, the INS should give its consent at the time it adjudicated the application for SIJ status. The memo also specified what information would be sufficient to show that the juvenile court findings were due to abuse, neglect, or abandonment and directed immigration officers to be sensitive to confidentiality concerns about the dependency proceedings.

With respect to those juveniles in INS custody, the memo upheld the strongest INS position that the Attorney General's consent must be obtained *prior* to the issuance of the dependency order. Further, the INS clarified that the request for consent must be made in writing and directed to the district director. The memo also specified:

[The district director] should consent to the juvenile court's jurisdiction if: 1) it appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and 2) in the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile.<sup>39</sup>

Although designed to rectify confusion about the statute, this language does little to respond to the numerous problems that the custodial consent requirement has caused.

#### IV. PROBLEMS WITH THE CONSENT REQUIREMENT FOR CHILDREN IN CUSTODY

Numerous advocates have encountered difficulties in presenting SIJ applications to the juvenile courts and the INS following the 1997 amendments. While the latest memorandum from the INS should relieve some of the problems for children not in INS custody, it does little to clarify the law applicable to children whom the INS interprets to be in its custody. The real-life situations documented below give a few specific examples of the types of problems that arise.

A 17 year-old Chinese national fled his country because of physical and emotional abuse by his parents. After presenting a fake passport upon arrival in the U.S, the child, G.L., was taken into INS custody and transferred to a detention center in Arizona. Later,

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38. Cook to Regional Directors, *supra* note 34.

39. *Id.*

G.L. was paroled pending an exclusion hearing before an immigration judge and was released into the custody of his maternal aunt. On behalf of G.L., the maternal aunt sought to formalize her custodial arrangement and filed a petition for guardianship in a Massachusetts probate court. The juvenile court judge issued a temporary order of guardianship because of his concerns that the permanent guardianship was being sought as “a shield against deportation” rather than “primarily for the protection of the child.”<sup>40</sup>

At his first removal hearing, G.L.’s attorney informed the INS trial attorney that G.L. intended to pursue adjustment of status through a SIJ petition. On March 11, 1998, a few days before the permanent guardianship hearing, G.L.’s attorney again informed the INS of the probate court proceedings. The INS raised no objection at that time. After receiving the prerequisite probate court findings, G.L. then filed for SIJ status with the INS District Office, including in his application all required elements: a copy of the juvenile court findings, an I-360 petition, and an application for adjustment of status. The INS, however, denied G.L.’s petition and stated that the INS had never formally consented to the jurisdiction of the probate court.

On appeal, the respondent argued that because no regulations laid out the proper mechanism for the consent of the INS, consent should be inferred from the INS’s silence and apparent acquiescence in response to repeated notice by the child’s attorney of his intention to file for SIJ status. Further, respondent suggested that G.L. did not need the INS’s consent because paroled children are not in the INS custody. The Administrative Appeals Unit did not decide the case promptly, and the delay resulted in G.L.’s “aging out” of eligibility for SIJ status.

In another SIJ case pending before the District Director of Boston, the attorney persuaded an INS official that custody should not be defined to include all children at any stage of deportation proceedings, but rather should be read more narrowly to exclude children who had only received a Notice to Appear and had never been detained by the INS.<sup>41</sup> Another immigration lawyer requested consent to a SIJ application for a child in deportation proceedings for over a year and a half before finally convincing the INS official that consent was appropriate.<sup>42</sup> Other immigration attorneys have noted the hesitation of many juvenile court judges to issue dependency orders for alien children. The judges are concerned about being chastised for having taken jurisdiction inappropriately when the INS may later rule either the child was in INS custody or that the petition was brought for purposes of avoiding deportation rather than for protection from abuse, ne-

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40. Brief in Support of an Appeal of Denial of a Special Immigrant Juvenile Petition by the District Director of Boston, Massachusetts, at 4 (on file with author).

41. In this particular case, a delay of several years had followed the issuance of the Notice to Appear, during which period the INS took no action to deport the child. However, it initially refused consent to SIJ status because the child was technically in deportation proceedings. See telephone interview with Maureen O’Sullivan, Attorney with the Boston law firm of Kaplan, O’Sullivan, and Friedman (Dec. 8, 1999).

42. Interview with Halim Morris, Immigration Attorney with Greater Boston Legal Services, in Boston, Mass. (Nov. 30, 1999).

glect, and abandonment.<sup>43</sup> As a result, alien children face higher bars than U.S. citizen children in demonstrating their need for guardianship orders.

Given the confusion, mistrust, and miscommunication that reign between the juvenile courts, local INS offices, and child immigration advocates, the major result of the 1997 amendment has been delay. As demonstrated in the above situations, when a child in INS custody does not receive consent to petition the juvenile court, long legal battles generally ensue. Whether pursued through mountainous correspondence with the District Director in an effort to persuade a different result, or whether taken up in an administrative appeal, the process is long and frustrating.<sup>44</sup> The most unfortunate consequence of this delay is that while waiting for the INS's consent, a number of children "age out" of eligibility for SIJ because they are no longer juveniles under the INA definition.<sup>45</sup> Additionally, the delay makes the process quite expensive, a serious consideration because most children who are dependent on the juvenile court are indigents. Further, this confusion has prevented the effective training of social service agencies in SIJ law and has hindered the dissemination of information by informed advocates.<sup>46</sup>

#### V. POTENTIAL LEGAL CHALLENGES TO THE 1997 AMENDMENT

The primary effect of the consent requirement in the 1997 amendment is to deprive state juvenile courts of jurisdiction over some alien children residing in their territory. This change can be viewed through two primary, and related, lenses. The consent requirement is in one sense a court-stripping provision, eliminating the jurisdiction of juvenile courts. Alternatively, the amendment can be analyzed under the rubric of the Supremacy Clause and viewed as a question of federal versus state jurisdiction. Both of these constructions yield legal challenges, as does the INS's administrative definition of custody.

The custodial consent requirement bars state juvenile courts from conducting pro-

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43. Interview with Eleanor Newhoff, Immigration Attorney with Greater Boston Legal Services, in Boston, Mass. (Nov. 9, 1999).

44. Some relief from these delays may in sight. On January 28, 1999, a federal judge denied the INS's motion for Judgment on the Pleadings in a lawsuit brought by a SIJ applicant on behalf of herself and a purported class of similarly situated individuals who have been awaiting adjudication of their petitions for more than one year and in some cases as long as two and a half years. The judge rejected the INS's argument that federal jurisdiction was inappropriate and eliminated by the court-stripping provision of the INA, 8 U.S.C. § 1252(g), and allowed the application for an affirmative injunction or a writ of mandamus commanding the INS to adjudicate the SIJ petitions to proceed. *See* *Yue Yu v. Brown*, 36 F. Supp. 2d 922 (D.N.M. 1999).

45. The INS regulations specify that for the purposes of SIJ applications, a juvenile is any person under the age of 21 years who is still a dependent of the juvenile court. *See* 8 C.F.R. § 204.11(c)(1) (2000). However, most states require that a youth be under the age of 18 at the time he or she first is declared a special immigrant juvenile and only allow the juvenile court to retain jurisdiction over children over the age of 18 in special circumstances.

46. In its training materials on SIJ petitions, the Immigrant Legal Resource Center repeatedly cautions readers about the ambiguities in the law and encourages them to seek expert counsel in the situation of a child in INS custody. *See* BRADY, ET. AL., *SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN IN THE DÉPENDENCY SYSTEM*, § 1.9, at 9 (2d ed. 1997).

ceedings that would allow an alien child to pursue SIJ status. Thus, the provision acts to eliminate juvenile court jurisdiction, apparently on the basis of the federal government's authority over immigration law. The question remains whether this removal of state court authority over juveniles is legal.

The U.S. Constitution is silent as to family law, an area that is traditionally the province of state courts. Immigration law, however, is an exclusively federal area. Although the exact source of federal immigration authority is murky,<sup>47</sup> the Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."<sup>48</sup> Given these conflicting arenas of authority,<sup>49</sup> the fundamental question is what exactly does the amendment purport to do? Does it simply direct INS officials to ignore juvenile court findings in the case of a juvenile in custody, unless prior specific consent from the INS has been given? Or does it completely prevent juvenile courts from even taking jurisdiction in the case of an alien child in custody without securing the permission of the INS? The plain meaning of the statute appears to suggest the latter, more aggressive, interpretation: "[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction."<sup>50</sup>

If the provision is that sweeping, the statute may be invalid law and is certainly questionable policy. To illustrate, consider the following hypothetical: an alien child put in deportation proceedings is paroled by the INS into the care of a social services agency. The agency locates and places the child with a foster family, whose members then physically and sexually abuse the child. A concerned school social worker complains but the social service agency denies the abuse and INS refuses to consider the situation. The social worker, on behalf of the child, then seeks protective orders from the

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47. Possible direct sources of federal immigration authority are the Commerce Clause, the War Clause, the Migration of Importation Clause, and the Naturalization Clause. Federal power may also be derived from implied constitutional authority, an approach that seems to have been adopted in the Chinese Exclusion case. See LEGOMSKY, *supra* note 26, at 8-11.

48. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

49. If the United States were to ratify the United Nations Convention of the Rights of the Child, this balance of power might be significantly altered. Since compliance with an international treaty is the responsibility of the federal government, passage of the UNCRC could significantly empower the federal government to promulgate regulations affecting children's welfare and family matters. Ratification of the UNCRC, however, would also obligate the United States to give greater protection to children. See, e.g., Note 19 of the UNCRC which reads:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, art. 19, (1990), *reprinted in* CHILDREN'S RIGHTS IN AMERICA, xi, xviii (Cynthia Price Cohen & Howard A. Davidson, eds. 1990).

50. 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (1994 & Supp. 1999).

state juvenile court to force the removal of the alien child from the abusive situation. Does the 1997 amendment deprive the state court of its authority to relieve the suffering of the alien child?

The statutory language implies yes. Yet when any consideration is paid to the purpose, indeed the duty, of the state juvenile courts to protect children living in their territory, the answer should be no. The juvenile courts exist exactly to protect children whose guardians are failing to do so. In the above scenario, the juvenile court is the most qualified and experienced authority to come to the assistance of the alien child. Further, the state juvenile court is the only body that actually has the power to help the child. Nothing in the immigration laws or any other federal law appears to allow the interference of the federal courts in this situation. State family law is the only protective mechanism for the child. To the extent the amendment strips the child of his power to enforce his rights to a safe home and to adequate care, the statute appears to directly conflict with state law. Although an ambitious attack, this challenge to the 1997 amendment goes right to the heart of the problem—the 1997 amendment gives excessive authority to the federal immigration service.

The best rebuttal to this argument relies on the Supremacy Clause.<sup>51</sup> Congress may preempt state power to regulate in three ways: 1) by express statement, 2) by implied occupation of a regulatory field, or 3) by implied preclusion of conflicting state regulations.<sup>52</sup> In his analysis of the SIJ provision, Judge Boggs of the Sixth Circuit interpreted the 1997 amendment to be an express command from Congress that pre-empted state law.<sup>53</sup> If this is the case, then the INS position is correct that juvenile court orders issued without INS consent are invalid. State law must not be enforced if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>54</sup> However, this doctrine assumes that the federal government possesses Constitutional authority to regulate in the area of family law. As noted above, nothing in the Constitution suggests federal power over family matters and this is probably one of the powers reserved for the States.

In his analysis of whether the original SIJ statute pre-empted juvenile court orders, Judge Boggs determined that there was no actual conflict between the state court’s jurisdiction and the pre-amendment SIJ law: “The state court judgment cannot, by itself, determine whether Gao will be deported. It merely classifies Gao for reasons extraneous to the INS’s further proceedings . . . If the INS is ultimately prevented from deporting

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51. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any of any State to the contrary notwithstanding.” U.S. CONST., art. VI, cl. 2.

52. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190 (1983).

53. *Gao v. Jennifer*, 185 F.3d 548; cf. *In re Gonzalez*, 2000 WL 492102 (Fla. Cir. Ct., April 13, 2000).

54. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

him, it will be because its own rules deem him non-deportable.”<sup>55</sup>

This argument may continue to apply even after the amendment. State courts were never authorized to grant withholding of deportation or rule on immigration matters. If a juvenile court classifies a child (such as the one in the hypothetical example above) as dependent on the juvenile court, its finding only impacts federal immigration law because of the specifications of the Immigration and Nationality Act.

Additionally, the Sixth Circuit in *Gao* observed that a grant of SIJ status,

does not, in itself, restrain or compel the government with respect to deportation. It merely makes him eligible for permanent resident status according to the INS's own rules. Furthermore, attaining SIJ status would only entitle [a child] to apply for permanent status—the actual grant is both discretionary and conditioned.<sup>56</sup>

The problem of course is that the 1997 amendment effectively changed the INS's “own rules” and restricted eligibility for SIJ status.

Judge Boggs seemed disturbed by the stripping of state court jurisdiction and observed: “The INS position leads to absurdity. For example, it would mean that if INS rules prevented deportation of a married illegal alien, state courts would violate sovereign immunity by licensing such a marriage.”<sup>57</sup> By analogy, this suggests that state courts do not violate sovereign immunity by issuing dependency orders, even though the INS rules prevent deportation of children who qualify as special immigrant juveniles. The counter to this argument is that the law no longer allows grants of SIJ status to alien children who are in the actual or constructive INS custody without the Attorney General's consent. Nevertheless, it is easy to imagine the public outrage if Congress acted to prohibit state courts from licensing marriages (another fundamental area of state family law jurisdiction) to aliens facing deportation for the purpose of preventing their adjustment of status due to marriage to a U.S. citizen, since such an adjustment provision is effectively the INS's own rule or, more precisely, a law of Congress's creation. The challenge to federal supremacy in immigration law is an uphill battle at best and will likely be brought under a provision with broader application than the SIJ statute.

A more viable method of altering the impact of the 1997 amendment may be to challenge the INS's broad interpretation of “actual or constructive custody.”<sup>58</sup> Indeed,

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55. *Gao*, 185 F.3d at 555.

56. *Id.* at 554-55. Judge Boggs cited 8 U.S.C. § 1255(a) for this proposition.

“The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his *discretion and under such regulations as he may prescribe*, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.”

8 U.S.C. § 1255(a) (1994)(emphasis added).

57. *Gao*, 85 F.3d at 555.

58. 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (1994 & Supp. 1999).

this is the most common tactic immigration advocates are currently using. The definition of custody advanced by the INS in its initial field guidance was not clarified or adjusted in its more recent memorandum. Therefore, it appears that the INS is still taking the position that “juveniles in foster care are still in the legal custody of the INS despite the delegation of physical custody to social services agencies who can better accommodate their needs.”<sup>59</sup> This interpretation seems overly broad given the definition of constructive or legal custody that courts have used in other contexts.

Courts have extensively considered the proper definition of custody in the context of habeas petitions filed by either prisoners or other aliens facing deportation. Although these cases are not strictly analogous to the instant SIJ situation, in light of Congress’s failure to define custody, it is a reasonable inference that Congress intended for constructive custody in the SIJ context to be interpreted consistently with its application in other areas of the law.

Because habeas petitions challenge the action of the state to restrict the liberty of a person, a prerequisite to habeas corpus is that the petitioner be in the custody of the state body that he challenges. It is well understood that “physical custody is not required, but the petitioner must show that she is subject to ‘restraints not shared by the public generally.’”<sup>60</sup> “Courts have expanded what constitutes custody for purposes of habeas jurisdiction in the immigration context.”<sup>61</sup> For example, the courts have found immigrants subject to a final deportation order to be in the constructive custody of the INS.<sup>62</sup> This holds true even though the alien may be released on bond or parole after the entry of the final order of deportation.<sup>63</sup>

The key to the finding of custody in these settings is the finality of the adjudication—the alien must under law obey the INS’s determination that he leave the country and therefore is under the control of the state. In the case of a special immigrant juvenile who faces deportation proceedings, the element of finality is clearly missing. Numerous results may follow the initiation of deportation proceedings besides the entry of a final order of deportation: the alien may be granted voluntary departure, the court may grant withholding of removal, the alien may successfully adjust his status, etc. Although the INS asserts that any child in deportation proceedings is in legal INS custody, this interpretation runs counter to the courts’ definition of custody in the habeas context. Alien children in deportation proceedings simply face an administrative procedure to determine whether they are deportable. The only legitimate reason for government control

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59. Cook, “Field Guidance” Memorandum, *supra* note 36.

60. *Sanchez v. District Director, Immigration & Naturalization Service*, 962 F. Supp. 1210, 1213 (D. Neb. 1996), (quoting *Jones v. Cunningham*, 371 U.S. 236, 240-242 (1963)).

61. *Saywack v. Attorney General of United States.*, 1993 WL 205121, at \* 3 (S.D.N.Y. June 9, 1993).

62. *See, e.g., Daneshvar v. Chauvin*, 644 F.2d 1248, 1251 (8th Cir. 1981). *But see Ihekwa v. A.D. Moyer*, 1992 WL 201934 at \*2 (N.D. Ill. Aug. 13, 1992) (noting that “However, merely being subject to a final order of deportation is not being ‘in custody’ as that construction would defeat Congressional intent to limit review of final orders to the circuit courts.”).

63. *See Varga v. Rosenberg*, 237 F. Supp. 282 (S.D. Cal. 1964).

over an alien at that time is to assure that he appears at the deportation proceedings, not to hold him in custody to assure that he is deported, since the alien may not in fact be adjudicated deportable.

In situations when the alien will be subject in the future to deportation proceedings, the interpretation of custody is more complicated. This arises most frequently in the context of detainers filed by the INS to claim jurisdiction over a prisoner.

[T]he clear majority view on this issue is that an INS detainer constitutes (1) a notice that future INS custody will be sought at the conclusion of a prisoner's pending confinement by another jurisdiction, and (2) a request for prior notice regarding the termination of that confinement, and thus does not result in present confinement by the INS.<sup>64</sup>

Therefore, most courts do not consider the filing of a detainer notice to be sufficient to constitute INS custody.<sup>65</sup> A possible strategy for argument is to analogize the filing of a Notice to Appear (NTA), used to initiate deportation proceedings, with the filing of an INS detainer. The issuance of a NTA is probably insufficient, in and of itself, to meet even a loose definition of custody, as the NTA only requires an alien to appear before an immigration judge to answer the charge of deportability. Although INS may choose to detain the alien in physical custody, this is rarely done in the case of juveniles who are frequently released without bond. Therefore, the NTA does not actually restrain the alien child sufficiently to create a constructive custodial situation, especially when the child was never taken into physical custody and paroled.<sup>66</sup> Instead, the NTA should be construed, like a detainer, as a warning that future INS custody may be sought if and when certain conditions occur.

## VI. PUBLIC POLICY IMPLICATIONS AND ISSUES

The legal challenges detailed above suggest how the interpretation of this law influences and reflects important policy determinations about the best interests of alien children in INS custody. While the best interests of the child is the dominant legal standard in most states for determining a child's placement, and indeed was explicitly written by Congress into the SIJ provision,<sup>67</sup> it is also a general rubric for evaluating a child's well-

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64. *Castronova v. United States Parole Comm'n*, 1995 WL 604327, at \*3 (W.D.N.Y. 1995).

65. *Id.* at \*4 (quoting *Dearmas v. INS*, 1993 WL 213031, at \*3 (S.D.N.Y. June 15, 1993)).

66. *Cf. Velazquez v. INS*, 876 F. Supp. 1071, 1074 (D. Minn. 1995) (noting that petitioner is in custody when the petitioner has been released from physical custody on INS bond and is ordered to report for deportation) with *Isaraphanich v. Sava*, 663 F. Supp. 120, 122 (S.D.N.Y. 1987) (observing that petitioner is not in custody when released on INS bond and there is no showing the petitioner is prohibited from engaging in certain activities). See also *Sanchez v. District Director, Immigration & Naturalization Service*, 962 F. Supp. 1210, 1213 (D. Neb. 1996) (collecting and comparing numerous definitions of custody in the immigration context).

67. See 8 U.S.C. § 1101(a)(27)(J)(ii) (Supp. 1999).

being under the application of any body of law.<sup>68</sup> In its failure to provide any meaningful benefit to alien children in INS custody, the 1997 amendment undermines the best interests of the child standard and effectuates damaging policy.

One of the major harms inflicted on alien children by the 1997 amendment is the delay caused by the INS's poor implementation of the law. The failure to generate any regulations, even after a period of four years, has frustrated many immigration advocates. Worse, it has pitted these attorneys against the INS trial attorneys in a paper war over whether or not consent is required, has been given, or should be granted. The resulting delay is particularly unacceptable in the context of children's lives. The continuity of relationships is essential for a child's development. One expert has asserted that children require permanent placements within a year of separation from their parents to avoid psychological harm.<sup>69</sup> The courts have also recognized the importance of finding children permanent care situations as quickly as possible. "No cases of any kind have a greater claim for expedition at all stages than those involving care and custody of children."<sup>70</sup> However, the INS has hindered state juvenile courts from expediently addressing dependency proceedings when the child is construed to be in INS custody. In this regard, the revised SIJ law hinders Congress's original intent of aiding abused, neglected, or abandoned alien children in establishing SIJ status and the attendant stability that comes with lawful permanent resident status.

Another policy problem with the 1997 consent provision is the danger that the INS now acts as a gate-keeper to the state juvenile courts, essentially making an initial determination about the best interests of the child before allowing the child to seek protective orders from the juvenile court. For children in INS custody, the consent requirement effectively means that the INS exercises *its* judgment as to what is in a child's best interest. This raises two concerns. First, the INS has no expertise in the area of family law. Second, the INS cannot possibly make a fair determination as to the child's best interest since it is simultaneously charged with prosecuting the child's deportation. These problems demonstrate that the 1997 amendment authorized an excessive grant of authority to the INS that it is incapable of exercising properly.

The creation of specialized family or juvenile courts arose out of the realization that the complexity of relationships in children's lives demanded expertise and judicial specialization.<sup>71</sup> A highly trained and interested adjudicator with experience evaluating

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68. Not only is the best interests of the child standard used by every court in America, the United Nations has also recognized its importance in Note 3 of its Convention on the Right of the Child:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

United Nations Convention on the Right of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

69. JOSEPH GOLDSTEIN, ET. AL., *BEFORE THE BEST INTEREST OF THE CHILD*, 19-20, 31-32 (2d ed. 1979).

70. *Custody of a Minor*, 452 N.E.2d 483,489, n.2 (Mass. 1983).

71. Jay Folberg, *Family Courts: Assessing the Trade-Offs*, 37 FAM. & CONCILIATION CTS. REV. 448, 450.

social worker documentation, mental health reports, and the testimony of family members is most apt to correctly make a child placement determination. “[D]ependency proceedings are expert governmental deliberations dedicated to identifying and implementing a plan that is in the best interests of the child.”<sup>72</sup> The importance of these decisions mandates that the decision-making body possess expertise. Unfortunately, the INS utterly lacks such experience and knowledge.

The comments to the regulations promulgated for the original SIJ statute make it clear that the INS, at least at one time, admitted it was unqualified to rule on child well-being.

The Service does not intend to make determinations in the course of deportation proceedings regarding the “best interest” of a child for the purpose of establishing eligibility for special immigrant juvenile classification . . . The Service believes that it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.<sup>73</sup>

Yet, this is exactly what the amendment requires—a determination by the district director that the “dependency proceeding would be in the best interests of the juvenile.”<sup>74</sup> The comments on the final regulations for the original SIJ laws noted that “[t]he Service also believes it would be impractical and inappropriate to impose consultation requirements upon the juvenile courts or the social service system, especially requirements which could possibly delay action urgently needed to ensure proper care for dependent children.”<sup>75</sup> However, this is exactly what the 1997 amendment accomplished. The juvenile courts and social service agencies are required to consult the INS to ascertain that the Attorney General consents to the dependency proceedings for an alien child in INS custody. Instead, for “juvenile or family courts to function effectively, they should have the jurisdiction to order the cooperation of other public agencies and institutions in delivering specific services and treatment to the children and families before the court.”<sup>76</sup>

The above quotations demonstrate that even the INS had determined that actions similar to those now required by the 1997 amendment would be detrimental to children. Congress’s amendment of the SIJ law delegated authority to the INS that it cannot effectively manage. Because of the INS’s lack of expertise in making best interest determina-

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72. Memorandum by Kathy Brady, Immigrant Legal Resource Center, concerning “Important Update Information and New Developments on Special Immigrant Juvenile Status,” (July 26, 1999) (on file with author).

73. Supplementary Information for the Final Rule, 8 CFR pts. 101, 103, 204, 205, 245, Federal Register, Vol. 58, No. 154.

74. Cook, “Field Guidance” Memorandum, *supra* note 36.

75. Supplementary Information for the Final Rule, 8 CFR pts. 101, 103, 204, 205, 245. Published in the Federal Register, Vol. 58, No. 154.

76. Robert E. Shepherd, Jr., *The Juvenile Court in the 21<sup>st</sup> Century*, 14 CRIM. JUST., Fall at 48, 49 (1999).

tions, numerous errors occur in consent decisions, thereby depriving needy children of relief.

The second and more disturbing problem stems from the dual role that the INS takes on when it deals with an alien child in deportation proceedings who wishes to seek SIJ status. On the one hand, the Attorney General delegates authority to the INS to administratively prosecute deportation cases. By definition, any child seeking SIJ status is not lawfully present within the United States since the entire purpose of the procedure is to legalize the child's status. On the other hand, the 1997 amendment requires the INS to determine whether or not to consent to the juvenile court's jurisdiction on the basis of "the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile."<sup>77</sup> These roles clearly conflict, leaving INS officials in a difficult position. While humanitarian concerns may motivate some INS district directors to frequently give consent to SIJ petitions, other INS offices may view their most important duty as "punishing" the child for his illegal presence in the country.<sup>78</sup>

Thus far, only one court seems to have recognized this tension. In a pre-1997 amendment case depriving the state juvenile courts of jurisdiction for a child in INS custody, Judge Randall of the Minnesota Court of Appeals lamented the ramifications of the court's holding:

The INS puts itself in a truly anomalous position. They argue that Y.W. cannot really be a CHIPS [child in need of protection or services], because a real CHIPS has no "guardian" and the INS points out that it is his "guardian." The question cries out for an answer. What kind of guardian is the INS where "the guardian" wants to deport Y.W. and his so-called "non-guardians," his foster parents want to help him in this country and not deport him. Who is really guarding whom? This is a pure political turf battle . . . When all is said and done with this case, I believe we have followed the law, but I feel uneasy. We have accomplished nothing constructive. I am not comfortable with the INS holding itself out as Y.W.'s guardian, while at the same time they vigorously line up a case to deport him.<sup>79</sup>

Trying to balance the conflicting duties does not easily solve the dilemma that INS faces in deciding how to proceed in these cases. The very existence of a SIJ provision reflects the public desire, and Congress's intent, to assist abused, neglected or abandoned children. These reasons and concerns should almost always weigh in favor of granting a child's request for consent. Indeed, many advocates believe it will be the rare or non-existent case in which it would not be in the best interests of a child seeking SIJ status to

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77. INS Memoranda, "Memorandum #2: Clarification of Interim Field Guidance," by Thomas E. Cook (July 9, 1999.).

78. Not only will a particular district director's political views about immigration affect how he resolves these two conflicting duties, but also the regional variances in caseload level and differences in public sentiment toward immigrants may also effect the outcome of this decision. Of course, these are factors completely beyond the alien child's control.

79. *In re Welfare of Y.W.*, 1996 WL 665937, at \*5 (Minn. Ct. App. Nov. 19, 1996).

remain in the United States.<sup>80</sup> Unfortunately, this is not the position taken by most INS offices.

## VII. CONCLUSION

By requiring INS to consent to juvenile court jurisdiction for children in INS custody, the 1997 amendment to SIJ law has prevented needy children from receiving an important benefit, lawful permanent residence. Although unaccompanied children in deportation proceedings are among the most vulnerable and helpless groups in American society, the INS has taken the position that its duty to deport these children should trump the intent of Congress to assist unaccompanied aliens through SIJ status. The disastrous policy results of the amendment, such as confusion, delay, antagonism from juvenile courts, and an abandonment of the best interests of the child standard, must be remedied. Lawsuits on behalf of SIJ applicants should challenge the validity of the amendment and demonstrate the problems of stripping juvenile courts of authority and construing custody in a narrow manner. Additionally, the following procedural changes would increase the fair and efficient application of the SIJ law:

- INS should immediately issue an Advanced Notice of Proposed Rulemaking and begin soliciting comments from immigration advocates about the best mechanisms for adjudicating consent. These regulations will not only clear up confusion, but will also standardize procedures from one INS office to another.

- Juvenile court judges should be properly trained in the current law regarding SIJ petitions. INS needs to widely disseminate its new memorandum that states that advance consent is not necessary for children not in INS custody. INS should also provide a memorandum to probate judges explaining the purpose of the SIJ law and specifying the nature and details of the findings that are prerequisite to SIJ status.

- INS officials responsible for adjudicating SIJ petitions should be chosen for their interest in legal issues involving children, and they should be given specialized training to enable them to make the best interest determinations with confidence and accuracy. One way to effectuate this suggestion would be to create a specialized corps of INS officials to handle SIJ cases, similar to the INS Asylum Corps, or alternatively to route all SIJ petitions to one INS Service Center, as is the procedure with Violence Against Women Act petitions.

- Immigration advocates should continue pressure on the INS to speed up adjudication of consent decisions. If necessary, a mandamus action should be brought, arguing that in the context of a child's life, a delay of a period of a year or more is excessive and unreasonable.

- The best interests of the child standard, as developed in juvenile and family

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80. See Memorandum by Kathy Brady, "Important Update Information and New Developments on Special Immigrant Juvenile Status," (July 26, 1999). (Noting, "It should be an extremely rare case where the District Director decides that such proceedings are not in the child's best interest.") (on file with author).

law, should determine whether or not the INS grants SIJ status. This should be a subjective standard that considers the peculiar nature of a given child's circumstances. Further, a presumption should exist that it is preferable to allow abused, neglected, or abandoned children to stay in the United States under the protection of the juvenile courts than to deport them to uncertain circumstances.

Whether through legal challenges, advocacy to the INS, or Congressional reform, the current interpretation of the 1997 amendment should change. The United States owes its youngest and most vulnerable immigrants the highest quality of adjudication and the most generous interpretation of benefits. Unaccompanied alien children in deportation proceedings should receive the protection of the government, not prosecution by it. The best interests of the child, rather than the best interests of the INS, should determine a child's future, allowing a more humane consideration of the needs of abused, neglected, or abandoned children to predominate.

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